INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Proceedings	2
The Decisions below as to Contribution	6
The Decisions Below as to Indemnity	12
Questions Presented	16
Reasons for Granting Certiorari	19

TABLE OF CASES CITED.

	PAGE
Aktieselskabet Cuzco v. *The Sucarseco*, 294 U. S. 394 (1935)	23, 24, 25
American Mutual Liability Insurance Co. v. *Matthews*, 182 F. 2d. 322 (1950)	9, 10, 23, 25
American Stevedores Inc. v. *Porello*, 330 U. S. 446, at 458 (1947)	9, 24
Baccile v. *Halcyon Lines and Haenn Ship Ceiling and Refitting Corporation*, 187 F. 2d. 403 (1951)	23
Barbarino v. *Stanhope S. S. Co.*, 151 F. 2d. 553 (1945)	23
Bethlehem Shipbuilding Corporation, Limited v. *Joseph Gutradt Co., et al.*, 10 F. (2d) 769 (1926)	26, 27
Briggs v. *City of Philadelphia*, 112 Pa. 50 (1933)	27
Canella v. *Lykes Bros.*, 174 F. 2d. 794 (1949)	20
Chase v. *Waste Material Corporation*, 111 Conn. 377 (1930)	27
Erie Railroad v. *Tompkins and the Uniformity of General Maritime Law*, 64 Harv. L. Rev. 246 at 267	19, 22
Erie Railroad Co. v. *Erie & Western Transportation Co.*, 204 U. S. 220 (1907)	22, 24
Fisher v. *Diehl*, 156 Pa. S. 476 (1945)	25
Garrett v. *Moore McCormack Co.*, 317 U. S. 239 (1942)	19
Guerrini v. *U. S.*, 167 F. 2d. 352 (1948)	8, 20, 21, 22
Hardt v. *Cunningham*, 136 N. J. L. 137 (Sup. Ct. 1947)	19
Hendricksen v. *Chicago*, 330 Ill. App. 141 (1947)	19
Hudson v. *Gas Consumer's Association*, 123 N. J. L. 252 (1939)	27
Intagliata v. *Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365 (1945)	19

PAGE

Pittsley v. *David*, 298 Mass. 552 (1937) 27
Porello v. *United States*, 153 F. 2d. 605 at 607 (1946) 9
Portel v. *United States*, D. C. N. Y., 85 F. Supp. 458, 462 (1949) 23
Puleo v. *H. E. Moss & Co.*, 159 F. 2d. 842 (1947) 20

Rederii v. *Jarka Corp.*, D. C. Me., 26 F. Supp. 304 (1939) 23
Rich v. *United States of America*, 177 F. (2d) 688 (1949) 26, 27
Riley v. *Agwilines, Inc.*, 296 N. Y. 402 (1947) 19, 20, 21
Robins Dry Dock & Repair Company v. *Dahl*, 266 U. S. 449 (1925) 19

Schubert v. *August Schubert Wagon Company*, 249 N. Y. 253, 256 (1928) 24, 27
Seas Shipping Company v. *Sieracki*, 328 U. S. 85 1946) 19, 20, 21
Slattery v. *Marra Bros. Inc.* v. *Wm. Spencer & Son Corporation*, 186 F. (2d) 134 (1951) 26
Standard Oil Company v. *Robins Dry Dock and Repair Co.*, 32 F. (2d) 182 (1939) 26

The Admiral Peoples, 295 U. S. 649 (1935) 2
The Alabama and The Gamecock, 92 U. S. 695 (1875) 23, 25
The Berwindglen, 14 F. Supp. 992 (1936) 2
The Chattahoochee, 173 U. S. 540 (1899) 10, 22, 24, 25, 26
The Ira M. Hedges, 218 U. S. 264 (1910) 23, 24
The S.S. Samovar, D. C. Cal., 72 F. Supp. 574, 588 (1942) 23
The Shangho, 88 F. (2d) 42 (1937) 2
The Tampico, D. C. N. Y., 45 F. Supp. 174 (1942) 23
The No. 34, 25 F. (2d) 602 (1928) 26
The North Star, 106 U. S. 17 (1882) 23, 25
Thorneal v. *Cape Pond Ice Co.*, 321 Mass. 528 (1947) 19

United States v. *Rothschild International Stevedoring Co.*, 183 F. (2d) 181 (1950) 26

STATUTES.

PAGE

28 U. S. C., §1254(1) 1

Jones Act (46 U. S. C. §688) 2

Conservation Act, 16 U. S. C. Section 457 20

OTHER AUTHORITIES.

Restatement Restitution, Sections 78, 83, 86 and 96 with comments 25, 27

Erie Railroad v. *Tompkins and the Uniform Maritime Law*, 64 Harv. L. Rev. 246, 265, 267 ..... 19, 21, 22

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1950.

No. .....

PARRY NAVIGATION COMPANY, INC.,

Petitioner,

against

TODD SHIPYARDS CORPORATION,

Respondent.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on or about February 9, 1951 (518).*

OPINIONS BELOW.

The two opinions of the District Court (475-481, 491-499) are reported at 90 F. Supp. 564 and 90 F. Supp. 567. The opinion of the Court of Appeals (513-519) is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered and filed on February 9, 1951 (518). The jurisdiction of this court is invoked under 28 U. S. C., §1254(1) and under Supreme Court Rule 38, 5(b).

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* References are to pages of the Record.

Proceedings.

On August 14, 1947, Spaulding, the plaintiff, who was employed as a seaman on petitioner's vessel, the S. S. *Lindenwood Victory*, sustained injuries when he fell from a ladder which he was descending from the ship to Pier 16, Hoboken, New Jersey (137, 140, 141). The vessel was moored at Pier 16 pursuant to a contract for repairs made by petitioner with Todd Shipyards Corporation* (257, 258, 266, 267, 270, 281, 471). The ladder was placed against the vessel by Todd (472).

Spaulding sued petitioner at law under the Jones Act (46 U. S. C. §688), claiming that his injuries had been caused by petitioner's negligence (6). Petitioner filed a third party complaint against Todd under Rule 14 of the Federal Rules, in which petitioner demanded judgment "for all the sums that may be adjudged against defendant, Parry Navigation Company, Inc., in favor of plaintiff, Robert Spaulding," on the ground that, as between petitioner and Todd, Todd's "negligence and fault in furnishing and placing the ladder was the sole and proximate cause of the injury to the plaintiff, Robert D. Spaulding" (13). In denying a remedy to the petitioner, the Court of Appeals determined that maritime rights are to be governed by the local state law rather than by the uniform maritime law.

The tort involved herein was a maritime tort.

> *The Admiral Peoples*, 295 U. S. 649;
> *The Berwindglen*, 14 F. Supp. 992;
> *The Shangho*, 88 F. (2d) 42.

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* Hereinafter, Todd Shipyards Corporation will be referred to as "Todd".

The jury rendered a general verdict in Spaulding's favor against petitioner in the sum of $45,000 (471). In the action of petitioner against Todd, the jury rendered a special verdict and found the following facts:

(1) That Todd provided and paid for the berth at Pier 16 (471);

(2) That it was the general practice at the Port of New York in August 1947, for ship repair companies (Todd was one) to provide a ladder or gangway for the ship's crew to board and leave their vessel at a berth provided by the ship repair company (471, 472);

(3) That Todd controlled the ladder involved in the accident and that petitioner did not (472);

(4) That Todd placed the ladder against the ship (472);

(5) That the ladder was improperly secured to the ship, for example, by *failing* to lash it to the ship's railing, so that a reasonably prudent person should have foreseen that someone using the ladder would be injured (472, 473). (Emphasis ours.)

In view of the previous finding that Todd placed the ladder against the ship, this finding meant, necessarily, that Todd failed to secure the ladder when Todd so placed it. This was in accord with the testimony of witnesses called by Spaulding, the plaintiff (67, 68, 70, 84, 105, 120, 121, 294).

The assumption by the Court of Appeals that Todd did lash the ladder when Todd placed it against the vessel (516), and that the lashing was thereafter removed by persons unknown (516), disregards this finding of fact by the

jury. The Court of Appeals' assumption rests solely on the testimony of witnesses called by petitioner whom the jury chose not to believe (169, 262, 516). Todd called no witnesses on the point.

(6) That the failure, i.e. Todd's failure, so to secure the ladder properly, caused or contributed to Spaulding's injury (473).

(7) That an officer or officers of the ship knew of the faulty failure, i.e. Todd's faulty failure, to secure the ladder and failed to correct the condition prior to the accident (473).

(8) That it was the duty of Todd and also the duty of petitioner's employees to see to it that the ladder was properly secured or lashed (473).

In view of the evidence, the claims of the parties, and the court's charge to the jury (465, 466), this finding meant that Todd owed a duty *to petitioner* to see to it that the ladder was properly secured or lashed. It may have meant, also that Todd owed such a duty to Spaulding as well.

Todd had undertaken in writing as follows:

> "Furthermore, we undertake to perform work on and dry dock vessels and provide berth, wharf, towage and other service and facilities only upon condition etc., etc. * * *." Defendant's Exhibit B (266).

The court charged the jury that petitioner contended "that it was the general practice whereby a ship repair company supplied gangways for boarding and leaving the vessel which had been turned over to the company for re-

pairs, and *that the contract between it and Todd compelled Todd to furnish a berth and all the incidentals"* (465). (Emphasis Ours.) The Court also charged the jury that Todd claimed "that there was no custom whereby it was required to supply gangways" (466), and that petitioner, not Todd, had "put up the ladder" (466).

The factual issues thus arising were determined in petitioner's favor by the jury's answers to questions numbered 1, 2, 4, and 8.

Whereas a finding that Todd owed a duty to Spaulding may have been a conclusion of law, as the Court of Appeals said it was (515), a finding that Todd owed a duty to petitioner was a clear finding of fact. It was a finding of fact as to the obligation consensually undertaken by Todd to petitioner in its repair contract.

The jury also found:

(9) That an employee of petitioner descended the ladder while Spaulding was still on it (473).

(10) That this employee was negligent in so descending the ladder (473).

(11) That his act in so descending the ladder caused or contributed to Spaulding's injury (473).

(12) That Spaulding was not negligent in the manner in which he descended the ladder (474).

Immediately after the jury rendered its verdict, petitioner moved that judgment be entered on the special verdict in its favor i.e. for full indemnity (474). Subsequently, petitioner moved that judgment be entered on the special verdict in its favor for contribution (487, 488).

The Decisions below as to Contribution.

The District Court granted petitioner contribution against Todd because it concluded that Todd's negligence, as found by the jury, had combined with petitioner's negligence in causing the injury (495).

Although the District Court had said, first, that the "law of the state where the injury occurred is determinative of the right to contribution or indemnity" (476), it corrected this later when it noted that contribution is a right "peculiar to the law of admiralty" and "the choice of the forum by the plaintiff cannot affect the defendant's substantive rights" (494).

Therefore, the District Court decreed that the petitioner was entitled, in this common law action, to have such contribution from Todd as petitioner would have been entitled to have if the plaintiff had sued in admiralty and the petitioner had impleaded Todd under the 56th Admiralty Rule (494, 495).

The Court of Appeals, to which Todd appealed, reversed (517, 518). But, the Court of Appeals did not disagree with the District Court's determination that petitioner's maritime rights, whatever they were, were to be enforced uniformly, whether asserted in admiralty or at common law (517, 518). The Court of Appeals' reversal was based solely on its conclusion that petitioner did not have a right to contribution under the maritime law (518). Such right to contribution was, in its opinion, non-existent, first because it was essential to the existence of such right that both petitioner and Todd be liable to Spaulding and, second, because Todd was not liable to Spaulding under what the Court of Appeals deemed the applicable law, *i. e.*, the common law of New Jersey, which, by reason of the fact that the accident had happened within New Jersey's territorial

limits, became the maritime law by a supposed process of analogy (518).

Todd's non liability to Spaulding was said to result, first, from a finding of fact made by the Court of Appeals (not the jury) that Spaulding knew that the ladder was dangerous when he used it (516), and the Court of Appeals' conclusion of law that, under the common law of New Jersey, an occupier of premises, such as Todd, has no duty of care to a business invitee in respect of a dangerous condition of the premises of which the business invitee is aware (515, 516).

It is unnecessary, at this point, to make more than passing reference to the fact that the Court of Appeals was in error in finding that Spaulding knew that the ladder was dangerous when he used it. This will be dealt with fully later on. See page 13 of this petition.

The decision of the Court of Appeals raises the following question, which is the first of the six questions hereinafter referred to.* It is as follows:

1. Should there be any uniformity in the maritime law?

(A) Is the maritime law of tort liability, notwithstanding the adoption by courts of admiralty of certain generally accepted common law principles as part of the maritime law, *sui generis*, and enforceable, as such, uniformly in federal admiralty courts and courts of common law?

(B) Or, is it merely the fluctuating analogue of the varying common law rules of tort liability of the states in which maritime causes of action for tort arise, and, therefore, does it vary from one admiralty

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* In the interest of clarity this petition will place each of the questions in the setting in which it arises. The question will also be grouped together in the usual manner under a heading "Question Presented."

court to another, and from one common law court to another?

The Court of Appeals' decision, it should be noted was not the traditional adoption for admiralty purpose of general common law principles. It was a declaration that the maritime law applicable to the maritime tort involved herein was, or was identical with, the common law of the situs of the tort, New Jersey. The same court had held previously, in *Guerrini* v. *U. S. A.*, 167 F. 2d 352, at 354, 355 (1948), that the law applicable to a maritime tort happening within New York's territorial limits was not the maritime law, but, the common law of New York. Moreover, the court recognized in the *Guerrini* case that, New York common law, unlike the New Jersey common law, makes an occupier of premises liable to an invitee, if the latter is injured by a dangerous condition of the premises, even though the invitee knows about the danger. 167 F. 2d. 352, at 355, 356. Thus, the doctrine, as announced by the Court of Appeals, is that the maritime law of liability for torts occurring within the territorial limits of states, whether enforced in admiralty or at common law, is wholly lacking in uniformity because it is nothing more than the sum of the varying common law rules of tort liability of the states in which maritime causes of action for tort may arise.

The second question arises by reason of the foregoing decision of the Court of Appeals that the existence of a maritime right of contribution between wrongdoers depends on the existence of a liability to the injured party by each wrongdoer. The question is as follows:

2. Under what conditions may one maritime wrongdoer obtain contribution from another, pursuant to the maritime law which, unlike the common law, permits contribution in respect of a tortious liability?

(A) Is it, as the Court of Appeals held, that the maritime right of contribution is similar to the legal or equitable right of contribution which arises when one of two persons, who share a non-tortious liability, pays more than his share, and, therefore, that the maritime right is available only when and because each maritime wrongdoer shares in the liability to the injured person?

(B) Or, is it, as this Court has many times held, that the maritime right of contribution arises directly from the tort to the injured party, and, therefore, is available when and because each wrongdoer contributes to the injury, even though one is insulated from liability to the injured party?

(C) And does it follow, therefore, that the maritime right of contribution is available to any liable wrongdoer, such as the petitioner, against another wrongdoer, such as the respondent, whether the latter is liable or not to the injured party, because he contributed to the injury by failing in a duty he owed either to the injured person or to the other wrongdoer?

The doctrine of the Court of Appeals has had a short history. It was first announced tentatively by the Court of Appeals for the Second Circuit in *Porello* v. *United States*, 153 F. 2d. 605 at 607 (1946). Although the Supreme Court indicated a different view in *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, at 458 (1947), the doctrine was put forward, again, tentatively, by the same Court in *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d. 322 (1950). It has attained its full efflorescence in the case at bar.

Originally, the Court of Appeals in the Porello case, relying on common law, as distinguished from admiralty, principles, said flatly that it is essential to a right of con-

tribution between maritime wrongdoers that their torts "have imposed a common liability upon them to the party injured." 153 F. 2d. 605, 607. Its attention was then called to the decision of the Supreme Court in *The Chattahoochee,* 173 U. S. 540 (1899), an admiralty case. As a result, the Court of Appeals withdrew from its stated position and left the question open. 153 F. 2d. 609.

In the *Matthews* case, the Court of Appeals, out of deference to *The Chattahoochee,* said that the existence of a maritime right of contribution may not depend exclusively on a sharing of a liability by the two wrongdoers to the injured party. It can exist also, said the court, in reliance on what it supposed was the rationale of *The Chattahoochee,* where the wrongdoer seeking contribution is the only one liable to the injured party, if the other wrongdoer has failed in a duty which he owed to the wrongdoer seeking contribution.

If the Court of Appeals had enforced in this case the rule with respect to contribution which it had set forth in the *Matthews* case, to say nothing of the true rule, as the Supreme Court had declared it in *The Chattahoochee* and other cases, the District Court's award of contribution must have been affirmed. As already noted, the jury found as a fact that Todd owed a duty to petitioner to properly secure the ladder, which duty it failed to perform, and that this caused or contributed to Spaulding's injuries. See p. 4 of this petition.

The third question arises by reason of the effect which the Court of Appeals' decision has on the uniformity of enforcement of a right to contribution under the maritime law. It is as follows:

3. Should the uniformity of the maritime law in respect of contribution be illusory or real?

(A) If, as was held or assumed by the Circuit Court, the maritime right of contribution must be enforced in a common law court uniformly with the enforcement of such right in admiralty, may such uniformity of enforcement be rendered illusory by making the existence of the right to contribution dependent, in the first instance, on the existence of a state-derived common law liability to the injured party by the wrongdoer against whom contribution is sought, and, therefore, subject to the fluctuating common law rules of the various states where maritime causes of action may arise?

(B) Or, should the faults or liabilities on whose existence such maritime right of contribution may depend be adjudged in the light of the self-determined admiralty law of tort liability, as a result of which uniformity of enforcement of the maritime right or contribution, whether in an admiralty court or a common law court, is achieved in fact?

If, as the Court of Appeals now says, the existence of a right to contribution under the maritime law depends exclusively on the existence of a common or shared liability of the two wrongdoers to the injured party, and one of the liabilities so required is a liability of one of the wrongdoers under the law of the state where the accident may happen, which varies from state to state, then, the uniformity of the maritime law in respect of contribution becomes as illusory as the uniformity of the maritime law of tort liability. In some cases there will be contribution, and in some, where the facts are identical, there will not, depending on the law of the state where the accident happens.

The Decisions Below as to Indemnity.

The District Court denied petitioner indemnity. It did so under the law of New Jersey, which it held to be the applicable law (476, 480, 481). Subsequently, the District Court corrected this when it noted that indemnity is a right "peculiar to the law of admiralty" and that "the choice of the forum by the plaintiff cannot affect the defendant's substantive rights" (494). But, the District Court did not then inquire nor decide whether, under the maritime law, petitioner was entitled to indemnity.

The ground on which indemnity was denied by the District Court, under the law of New Jersey, was that petitioner, in the court's opinion, was actively negligent (480, 481). In view of this, the court had no way of differentiating between the negligence of petitioners and the negligence of Todd (481).

The Court of Appeals, to which petitioner appealed, affirmed the District Court's denial of indemnity (517). However, it did not affirm the Distr[illegible] Court's conclusion that petitioner's negligence was active. The Court of Appeals likewise dealt with the question of indemnity as if it depended exclusively on New Jersey law (515, 517). Nothing was said by the Court of Appeals in respect of petitioner's right to indemnity under the maritime law.

The Court of Appeals rested its denial of indemnity, under the law of New Jersey, solely on the two following grounds. For one thing, the Court of Appeals found that there was no express contract by Todd to indemnify petitioner (517). This is conceded. The Court of Appeals also concluded, on the basis of its own finding (not the jury's), that the evidence showed conclusively that Spaulding knew that the ladder was dangerous when he used it, so that Todd

had no duty of care to Spaulding under New Jersey law, and, therefore, Todd could not be liable to Spaulding under New Jersey law (515-517). As already noted, a contrary finding by the jury that Todd had a duty of care to Spaulding was disregarded as a mere legal conclusion (515). Since Todd could not be liable to Spaulding under New Jersey law, the Court of Appeals concluded that Todd could not be liable to the petitioner as an indemnitor by operation of law, *i.e.*, New Jersey law, which was held to be the governing law (517).

Actually, the evidence did not show conclusively that Spaulding knew of the danger of using the ladder in the way he was using it at the time of the accident, i.e. in the way of one man's using it at a time. The evidence was that, although Spaulding knew that the ladder was not lashed, and had used it without incident on two occasions before the time of the accident (138, 157, 158), the only danger of which he was informed was that it was dangerous for more than one person to use it at the same time (160). The accident happened when, after Spaulding had already descended by himself part way down the ladder, another seaman got on it at the top (160). This caused the accident. The jury so found (480). The jury also found that Spaulding was free of negligence (480). Therefore, the Court of Appeals was in error in concluding that Todd was not liable to Spaulding under New Jersey law.

But, more important, so far as directly concerns the question raised herein, is the fact that, just as the Court of Appeals disregarded petitioner's right to indemnity under the maritime law, it also disregarded the fact, found by the jury, that Todd had a duty to petitioner, to properly secure the ladder, and that Todd's failure to perform this duty caused or contributed to the accident. (See p. 4 of this petition.)

Therefore, even though the Court of Appeals was correct in finding that Todd was not liable to Spaulding, which is challenged, the Court of Appeals was in error, first, in not applying maritime law, and, second, in failing to determine, pursuant to the maritime law, that, by reason of Todd's negligent failure to perform a duty which Todd owed to petitioner, petitioner was not *in pari delicto* with Todd, and Todd, therefore, was liable to petitioner as an implied indemnitor.

Consequently, the fourth question herein arises from the Court of Appeals' decision of the question of indemnity in the light of the law of New Jersey, within whose territorial limits the accident happened, rather than according to the maritime law, which was the law governing the liability for the tort, notwithstanding it occurred in New Jersey. The fourth question is as follows:

4. What is the legal origin of an implied right of indemnity of one maritime wrongdoer against another?

(A) Is it a substantive right of the maritime law?

(B) Or, is it a common law right of the state in which a maritime tort occurs?

The fifth question arises by reason of the Court of Appeals' ignoring the maritime law as the governing law and deciding that it is essential to implied indemnity, under the law of New Jersey, which it applied herein, that each wrongdoer be liable to the injured person. It is as follows:

5. What is the nature of such implied right of indemnity if it be a substantive right of the maritime law?

(A) Is it available only because and when each wrongdoer is liable for his wrong to the injured person?

(B) Or, is it available only because and when the wrongdoer seeking indemnity is not *in pari delicto* with the other, regardless of the latter's liability to the injured person for his wrong?

If the maritime law applies, and the maritime law, similarly to the common law of most states, permits recovery of indemnity when two wrongdoers are not *in pari delicto,* regardless of the existence of a common liability to the injured person, then, the contrary holding by the Court of Appeals raises squarely an important question as to what the maritime law in respect of indemnity is.

The sixth question raised by the decision below is similar to the third question, which is in respect of the uniformity of the maritime right of contribution. It arises by reason of the decision of the Court of Appeals that the existence of a right of indemnity for a maritime tort occurring within the territorial limits of a state depends on the existence of a state-derived common law liability by the party from whom indemnity is sought to the injured party. It is as follows:

6. Should the uniformity of the maritime law in respect of implied indemnity be illusory or real?

(A) If an implied right of indemnity of one maritime wrongdoer against another in respect of a maritime tort is a substantive right of the maritime law, which must be enforced uniformly, whether at common law or in admiralty, may such uniformity be rendered illusory by making the existence of the right to indemnity dependent, in the first instance, on the existence of a state derived common law liability to the injured party by the wrongdoer from whom indemnity is sought, and, therefore, subject to the fluctuating common law

rules of the various states where maritime causes of action may arise?

(B) Or, should the faults or liabilities on whose existence such maritime right of indemnity may depend be adjudged in the light of the self-determined maritime law of tort liability, as a result of which uniformity of enforcement of the maritime right of indemnity, whether in an admiralty court or a common law court, is achieved in fact.

Assuming that the right to indemnity is of admiralty origin, the condition to its existence imposed by the Court of Appeals makes any supposedly required uniformity in the enforcement of such right illusory. A question naturally arises as to whether there is any real meaning to the many declarations that the maritime law should be uniform.

Questions Presented.*

1. Should there be any uniformity in the maritime law?

(A) Is the maritime law of tort liability, notwithstanding the adoption by courts of admiralty of certain generally accepted common law principles as part of the maritime law, *sui generis*, and enforceable, as such, uniformly in federal admiralty courts and courts of common law?

(B) Or, is it merely the fluctuating analogue of the varying common law rules of tort liability of the states in which maritime causes of action for tort arise, and, therefore, does it vary from one admiralty court to another, and from one common law court to another?

2. Under what conditions may one maritime wrongdoer obtain contribution from another, pursuant to the

* The "Questions Presented", although already fully set forth, are grouped together at this point for the convenience of the court. The "Reasons for Granting Certiorari" begin at page 19.

maritime law which, unlike the common law, permits contribution in respect of a tortious liability?

(A) Is it, as the Circuit Court held, that the maritime right of contribution is similar to the legal or equitable right of contribution which arises when one of two persons, who share a non-tortious liability, pays more than his share, and, therefore, that the maritime right is available only when and because each maritime wrongdoer shares in the liability to the injured person?

(B) Or, is it, as this court has many times held, that the maritime right of contribution arises directly from the tort to the injured party and, therefore, is available when and because each wrongdoer contributes to the injury even though one is insulated from *liability* to the injured party?

(C) And does it follow, therefore, that the maritime right of contribution is available to any liable wrongdoer, such as the petitioner, against another wrongdoer, such as the respondent, whether the latter is liable or not to the injured party, because he contributed to the injury by failing in a duty he owed either to the injured person or to the other wrongdoer?

3. Should the uniformity of the maritime law in respect of contribution be illusory or real?

(A) If, as was held or assumed by the Circuit Court, the maritime right of contribution must be enforced in a common law court uniformly with the enforcement of such right in admiralty, may such uniformity of enforcement be rendered illusory by making the existence of the right to contribution dependent, in the first instance, on the existence of a state-derived common law liability to the injured party by the wrongdoer against whom con-

tribution is sought, and, therefore, subject to the fluctuating common law rules of the various states where maritime causes of action may arise?

(B) Or, should the faults or liabilities on whose existence such maritime right of contribution may depend be adjudged in the light of the self-determined admiralty law of tort liability, as a result of which uniformity of enforcement of the maritime right of contribution, whether in an admiralty court or a common law court, is achieved in fact?

4. What is the legal origin of an implied right of indemnity of one maritime wrongdoer against another?

(A) Is it a substantive right of the maritime law?

(B) Or, is it a common law right of the state in which a maritime tort occurs?

5. What is the nature of such implied right of indemnity if it be a substantive right of the maritime law?

(A) Is it available only because and when each wrongdoer is liable for his wrong to the injured person?

(B) Or, is it available only because and when the wrongdoer seeking indemnity is not *in pari delicto* with the other, regardless of the latter's liability to the injured person for his wrong?

6. Should the uniformity of the maritime law in respect of implied indemnity be illusory or real?

(A) If an implied right of indemnity of one maritime wrongdoer against another in respect of a maritime tort is a substantive right of the maritime law, which must be enforced uniformly, whether at common law or in admiralty, may such uniformity be rendered illusory by making the existence of the right to indemnity dependent, in the first in-

stance, on the existence of a state-derived common law liability to the injured party by the wrongdoer from whom indemnity is sought, and, therefore, subject to the fluctuating common law rules of the various states where maritime causes of action may arise?

(B) Or, should the faults or liabilities on whose existence such maritime right of indemnity may depend be adjudged in the light of the self-determined maritime law of tort liability, as a result of which uniformity of enforcement of the maritime right of indemnity, whether in an admiralty court or a common law court, is achieved in fact.

REASONS FOR GRANTING CERTIORARI.

(1) The decision of the Court of Appeals that the maritime law of tort liability is, or is identical with, the law of the state in which the accident happens, is in conflict with the decisions of this court (*Robins Dry Dock & Repair Company* v. *Dahl*, 266 U. S. 449 (1925); *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 (1946); *Garrett* v. *Moore McCormack Co.*, 317 U. S. 239 (1942)) and also with the following state court decisions: *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402 (1947); *Intagliata* v. *Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365 (1945); *Hendricksen* v. *Chicago*, 330 Ill. App. 141 (1947); *Thorneal* v. *Cape Pond Ice Co.*, 321 Mass. 528 (1947); *Hardt* v. *Cunningham*, 136 N. J. L. 137 (Sup. Ct. 1947).

This conflict is set forth at length in an article entitled "Erie RR *v.* Tompkins and The Uniform General Maritime Law," 64 Harv. L. Rev. 246.

(2) The decision of the Court of Appeals is the culmination of a process by which the Court of Appeals for

the Second Circuit, seemingly with conscious intent, has substituted the varying laws of the states for one uniform maritime law of tort liability. The process began with *Puleo* v. *H. E. Moss & Co.*, 159 F. 2d. 842 (1947), where the court held that, by reason of the requirements of the Conservation Act, 16 U. S. C. Section 457, state law, to the exclusion of the maritime law, was applicable to maritime torts happening within the territorial limits of a state. Thereafter, in *Guerrini* v. *U. S.*, 167 F. 2d. 352 (1948), the court receded from its holding that the Conservation Act required such a result, but persisted in its view that state law, to the excusion of maritime law, was the governing law. The court merely changed the basis for its position. Thus, it held that the decisions of the Supreme Court conflicting with its view, were no longer of any force and could be disregarded. 167 F. 2d. 352, 355. This being assumed, the court was free to declare that state law alone governs such maritime torts.

In so holding, the court overlooked the significance of the decision of the Supreme Court in the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). There, the Supreme Court had recently affirmed and extended the doctrine that the maritime law governs. Furthermore, in the *Guerrini* case, the Court of Appeals for the Second Circuit expressly disagreed with the Court of Appeals of the State of New York which, in the case of *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402 (1947), had declared that it was the maritime law, and not state law, which governs. In so declaring, the Court of Appeals of the State of New York expressly disagreed with the position of the Court of Appeals for the Second Circuit, as expressed in the *Puleo* case, *supra*, that it was the state law which governed.

In the case of *Canella* v. *Lykes Bros.*, 174 F. 2d. 794 (1949), the Court of Appeals for the Second Circuit recog-

nized, belatedly, the significance of the Supreme Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). Therefore, it concluded that the maritime law, and not the state law, governs. Therefore, the Court of Appeals enforced the maritime law, as it conceived it to be, and without regard to the law of the state in which the accident had happened. 174 F. 2d. 794, 796.

In the case at bar, the Court of Appeals has returned to its original position, i.e., that it is state law, to the exclusion of the maritime law, which governs a maritime tort occurring within the territorial waters of a state. This has been effected by holding that the maritime law is, or is identical with, the law of the state within those territorial waters the tort occurs (519).

If the Court of Appeals had merely used acceptable common law principles as models for the maritime law, its decision could not be questioned. See 64 Harv. L. Rev. 265. What the Court of Appeals did was altogether different, as will appear from what follows.

(3) Much confusion has been caused by the Court of Appeals' decision. On the one hand, the Court of Appeals of the State of New York, in *Riley* v. *Agwilines Inc.*, 296 N. Y. 402 (1947), declares that it is the maritime law, and not the law of the State of New York, which governs in the case of maritime torts occurring within New York's territorial waters. On the other hand, the Court of Appeals for the Second Circuit, in *Guerrini* v. *United States*, 167 F. 2d 352 (1948), says that it is the law of the State of New York which governs. Furthermore, in the case of maritime torts occurring within New Jersey's territorial waters on the other side of the Hudson River, the Court of Appeals for the Second Circuit holds that it is the law of New Jersey, misleadingly labelled as the maritime law,

which governs. The law of New Jersey as applied in this case differs from New York law. Thus, if the accident in the case at bar had happened in New York, New York law, unlike New Jersey law, would have permitted Spaulding to recover against Todd, notwithstanding his supposed knowledge of the dangerous condition of the ladder. *Guerrini* v. *United States,* 167 F. 2d 352, 355 (1948). In New Jersey disclosure of defects excuses the occupier of premises. In New York the occupier must go further and make the place safe.

As the learned author says in *Erie Railroad* v. *Tompkins and the Uniformity of General Maritime Law,* 64 Harv. L. Rev. 246, at 267: "The *Guerrini* case has produced an odd predicament * * * It is strange indeed to refuse to apply maritime law in admiralty and, yet, look to admiralty decisions when exercising common law jurisdiction." However, such is the confusing result of the decision below.

Moreover, as a result of such liability of Todd to Spaulding, the Court of Appeals, under its own definition of the nature of the maritime right of contribution, would have been compelled to reach a different decision in respect of petitioner's right to contribution herein. Therefore, under the decision of the Court of Appeals for the Second Circuit, a shipowner is liable if a maritime tort occurs in one state. He is not liable if it occurs in another. Moreover, if he is liable, he is entitled to contribution if the maritime tort occurs in one state and is not so entitled if the tort occurs in another.

(4) The decision of the Court of Appeals as to the factors which give rise to a maritime right of contribution is in conflict with the decisions of the Supreme Court in *The Chattahoochee,* 173 U. S. 540 (1899); *Erie Railroad Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220 (1907);

Aktieselskabet Cuzco v. *The Sucarseco*, 294 U. S. 394 (1935); *The Ira M. Hedges*, 218 U. S. 264 (1910) and with the rationale of the decisions of the Supreme Court in *The Alabama and The Gamecock*, 92 U. S. 695 (1875) and *The North Star*, 106 U. S. 17 (1882).

(5) The decision of the Court of Appeals for the Second Circuit as to the factors which give rise to a maritime right of contribution is also in conflict with the decision of the Court of Appeals for the Third Circuit in the case of *Baccile* v. *Halcyon Lines and Haenn Ship Ceiling and Refitting Corporation*, 187 F. 2d. 403. In the *Baccile* case, the Court of Appeals for the Third Circuit took due note of the position of the Court of Appeals for the Second Circuit, as set forth in *American Mutual Liability Co.* v. *Matthews*, 182 F. 2d. 322 (1950), and now applied in the case at bar, and disagreed with it.*

6. The decision of the Court of Appeals for the Second Circuit is also in conflict with the following District Court decisions:

Rederii v. *Jarka Corp.*, D. C. Me., 26 F. Supp. 304 (1939);

The Tampico, D. C. N. Y., 45 F. Supp. 174 (1942);

The S.S. Samovar, D. C. Cal., 72 F. Supp. 574, 588 (1942);

Portel v. *United States*, D. C. N. Y., 85 F. Supp. 458, 462 (1949).

It is in conflict, as well, with the court's own decision in the case of *Barbarino* v. *Stanhope S. S. Co.*, 151 F. 2d. 553 (1945), which was cited with approval by the Supreme

* We are informed that a petition for certiorari will be filed in the *Baccile* case.

Court in *American Stevedores Inc.* v. *Porello,* 330 U. S. 446, 458 (1947).

7. The position of the Court of Appeals for the Second Circuit is that contribution in admiralty between wrongdoers, like contribution between non-tortious obligors at common law, is permissible, generally speaking, only where the wrongdoers share liabilities to the injured person. Thus, where one wrongdoer becomes liable to the injured party, but the other wrongdoer, for any reason, such as the existence of a Compensation Act or some other immunizing factor, does not become liable, there cannot be contribution in admiralty. The Court of Appeals goes so far as to say that the absence of liability of the non-liable wrongdoer is the equivalent of absence of wrongdoing and of the absence of a duty! 182 F. 2d. 322, at 325. As to how false such reasoning is, see the leading case of *Schubert* v. *August Schubert Wagon Company,* 249 N. Y. 253, 256 (1928), a decision by Chief Justice Cardozo.

On the other hand, as the Supreme Court has held, the right of contribution between maritime wrongdoers, is not like the right of contribution at common law between non-tortious obligors. Such maritime right of contribution between wrongdoers arises from the tort to the injury party, i.e. it arises from the fact that both wrongdoers have joined in causing the injured party's loss. See Mr. Justice Holmes' remarks in *Erie RR Co.* v. *Erie & Western Transportation Company,* 204 U. S. 220 at 225, 226. Therefore, irrespective of the non-liability of one wrongdoer to the injured party, both must pay a moiety of the loss brought about by their joint causation. *The Chattahoochee,* 173 U. S. 540 (1899); *Erie Railroad Company* v. *Erie & Western Transportation Co.,* 204 U. S. 220 (1907); *The Ira M. Hedges,* 218 U. S. 264 (1910); *Aktieselskabet Cuzco* v. *The*

Sucarseco, 294 U. S. 394 (1935); *The Alabama,* 92 U. S. 695 (1875); *The North Star,* 106 U. S. 17 (1882).

There is no compelling reason for discarding the traditional admiralty theory of contribution between wrongdoers and substituting therefor the common law theory of contribution limited to non-tortious obligors. The admiralty theory of contribution, i.e. that it results from joint participation in causing the loss, which, therefore, must be borne equally, is, at least, as rational as the common law theory, i.e. that it results from joint participation in the liabilities arising from the loss which, therefore, must be shared equally. Indeed, the admiralty theory for requiring contribution between wrongdoers has been adopted in Pennsylvania. See *Fisher* v. *Diehl,* 156 Pa. S. 476 (1945).

Even the common law theory permits a non-tortious obligor to recover contribution from one who participated with him in an undertaking, but, who had, originally, or who has since acquired, a defense to liability to the obligee. See *Restatement Restitution,* Section 83.

The Court of Appeals in its decision in the *Matthews* case, which was the basis for the decision in the case below, attempted, but unsuccessfully, to distinguish *The Chattahoochee,* 173 U. S. 540 (1899). There was a sharp disagreement among the judges of the court as to how best to distinguish it. Thus, Judges Swan and Chase said that *The Chattahoochee* stood for the proposition that, in the absence of a shared liability to the injured third party, maritime contribution was permissible only where there was a non-performance of a duty owed by the non-liable wrongdoer toward the other wrongdoer. 182 F. 2d. 322, 324. Learned Hand, C. J. disagreed with this. 182 F. 2d. 322, 325.

In the case at bar, the jury found that there was such a non-performance of a duty owed by Todd to the petitioner. (See p. 4 of this petition). Nevertheless, the

Court of Appeals overlooked the fact that this case did not fall within the exception it had created to *The Chattahoochee* and so denied contribution. Thus, *The Chattahoochee*, a landmark of the maritime law, is discarded.

8. There is a conflict between the decision of the Court of Appeals for the Second Circuit in the case at bar and the decisions of the Court of Appeals for the 9th Circuit in *Bethlehem Shipbuilding Corporation, Limited* v. *Joseph Gutradt Co., et al.*, 10 F. (2d) 769 (1926) and *United States* v. *Rothschild International Stevedoring Co.*, 183 F. (2d) 181 (1950) in respect of the legal origin of the right of indemnity enforced in admiralty. The decision of the Court of Appeals for the Second Circuit is also in conflict with its two previous decisions in *The No. 34*, 25 F. (2d) 602 (1928) and *Standard Oil Company* v. *Robins Dry Dock and Repair Co.*, 32 F. (2d) 182 (1939). In both of these cases the Court of Appeals for the Second Circuit treated the right of indemnity in respect of a maritime tort as a maritime right, borrowed, possibly, from the common law by analogy, but not dependent on the law of any particular state.

9. Whether there is a conflict of circuits in respect of the Court of Appeals' decision as to the nature of the right of indemnity enforceable in maritime cases depends on whether the Court of Appeals meant to do what it did below. In *Rich* v. *United States of America*, 177 F. (2d) 688 (1949) as explained in *Slattery* v. *Marra Bros. Inc.* v. *Wm. Spencer & Son Corporation*, 186 F. (2d) 134 (1951), the Court of Appeals held that indemnity was permissible in a case of maritime tort, in the absence of a common liability by the wrongdoers to the injured party, if the accident was caused by the negligent performance of an act which one wrongdoer had a contractual duty to perform carefully

for the benefit of the wrongdoer seeking indemnity. In the case at bar it denied indemnity, although there was such a negligent performance of a contractual duty (See p. 4 of this petition), on the ground that there was not a common liability. Whether the Court of Appeals meant to overrule the *Rich* case, or merely overlooked it, is not known. If it intended to overrule it, the decision below is in conflict with the decision of the Court of Appeals for the 9th Circuit in *Bethlehem Shipbuilding Corporation, Ltd.* v. *Gutradt,* 10 F. (2d) 769 (1926).

10. The decision of the Court of Appeals in denying indemnity cannot be justified by analogy to common law principles of indemnity. The common law does not require that there be a common liability by the two wrongdoers to the injured party. See *Restatement Restitution,* Section 78, 86 and 96 with comments. See also *Schubert* v. *August Schubert Wagon Co.,* 249 N. Y. 253 (1928). *Pittsley* v. *David,* 298 Mass. 552 (1937); *Hudson* v. *Gas Consumer's Association,* 123 N. J. L. 252 (1939); *Chase* v. *Waste Material Corporation,* 111 Conn. 377 (1930); *Briggs* v. *City of Philadelphia,* 112 Pa. 50 (1933).

11. The decision of the Court of Appeals that the maritime law of tort liability is, or is identical with, the law of the state in which the accident happens also affects the uniformity of the maritime law in respect of indemnity. If, as the Court of Appeals held, indemnity is recoverable only where both wrongdoers are liable to the injured party and, if one or both of those liabilities is, or is identical with, the law of the state where the accident happens, indemnity is recoverable in some cases, whereas, on the same facts, it is not recoverable in other cases.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision below.

PARRY NAVIGATION COMPANY, INC.

By RAYMOND PARMER,
IRVING L. EVANS,
Counsel for Petitioner.

Dated: New York, N. Y., May 4, 1951.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 54

PARRY NAVIGATION COMPANY, INC.,

Petitioner,

against

TODD SHIPYARDS CORPORATION,

Respondent.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORPORATION, IN OPPOSITION TO THE PETITION

JAMES I. CUFF,
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INDEX

PAGE

FACTS 1

ARGUMENT:

Petitioner's questions as to uniformity of tort liability 6

Petitioner's questions and reasons as to the rights of contribution 13

Petitioner's questions and reasons as to the rights of indemnity 18

CONCLUSION 20

TABLE OF CITATIONS

Admiral Peoples, 295 U. S. 649 7

Aktieselshabet Cuzco v. The Sucassecceo, 294 U. S. 394 16

Alabama, The, v. Gewnecock, 92 U. S. 695 16

American Mutual Liability Insurance Co. v. Matthews 182 Fed. (2d) 322 ..... 15, 16, 17

Baccile v. Halcyon Lines & Haenn Ship Ceiling and Refitting Corporation, 187 F. (2d) 403 16

Baker v. Moore-McCormack Line, Inc. (D. C. Cal.) 57 Fed. Supp. 907 8

Barbarino v. Stanhope S. S. Co., 151 F. (2d) 553 16

Bethlehem Shipbuilding Corporation, Limited v. Joseph Gutradt, Co., et al., 10 F. 2d) 769 19

Cannella v. Lykes Bros., 174 F. (2d) 794 11

Chattahoochee, The, 173 U. S. 540 ..... 14, 15, 16, 17

Eggleston v. Republic Steel Corporation (D. C. N. Y.) 47 Fed. Supp. 658 8

Erie Railroad Co. v. Erie & Western Transportation, 204 U. S. 220 16

Garrett v. Moore-McCormack Co., 317 U. S. 239..... 11

Great Lakes Act, 28 U. S. C. A. sec. 770 (1946) 28 U. S. C. A. 1873 (1948) 8

Guerrini v. U. S. A., 169 F. (2d) 352, cert. den. 335 U. S. 843 ..... 10, 11

PAGE

Harter Act, 46 U. S. C. A. 192 14
Hendricksen v. Roberts (D. C. N. Y.) 74 F. Supp. 72 ..... 9, 12

Ira M. Hedges, The, 218 U. S. 264 16

Just v. Chambers, 312 U. S. 383 at 392 7

Kwasizur, et al. v. Dawnic S/S Co., et al. (D. C. Pa.) 25 Fed. Supp. 327 8

Mars, The (D. C. N. Y.) 1914, 9 F. (2d) 183, 184 10
McCandless v. United States, 298 U. S. 342, 347-348 12
Miller v. The Sultana, 2 Cir. 176 F. (2d) 203, cert. den. 338 U. S. 907 ..... 8, 12

Nolan v. General Seafood Corporation, 1 Cir., 112 Fed. 2d, 515 8
Norland, The, 9 Cir., 101 Fed. 2d, 967 7
North Star, The, 106 U. S. 17 16
No. 34, 25 F. (2d) 602 19

Porello v. U. S., 153 Fed. (2d) 605 15
Portel v. United States, 85 F. Supp. 458 16
Puleo v. H. E. Moss & Co., 159 F. (2d) 842 11

Rederic v. Jarka Corp., 26 F. Supp. 304 16
Riley v. Agwilines, Inc., 296 N. Y. 402 12
Robins Dry Dock & Repair Company v. Dahl, 266 U. S. 449 11
Robinson on Admiralty, page 309 ..... 2, 12

Seas Shipping Company v. Sieracki, 328 U. S. 85 11
Standard Dredging Corporation v. Murphy, 319 U. S. 306 7
Standard Oil Company v. Robins Dry Dock and Repair Co., 32 F. (2d) 182 19
S. S. Samovar, The, 72 F. Supp. 574 16

Tampico, The, 45 F. Supp. 174 16

Union Stockyards Company of Omaha v. Chicago, Burlington & Quincy Railroad Company, 196 U. S. 217 20
United States v. Rothschild International Stevedoring Co., 9 Cir. 183 F. (2d) 181 ..... 9, 10, 12, 19

West v. Camden, 135 U. S. 507, 521 12

Supreme Court of the United States

OCTOBER TERM, 1950

No. 728

PARRY NAVIGATION COMPANY, INC.,
Petitioner,

against

TODD SHIPYARDS CORPORATION,
Respondent.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORPORATION, IN OPPOSITION TO THE PETITION

Facts.

The Court of Appeals decided this case "under the facts appearing at the trial" (513),* the "undisputed facts" (515), as stated in the court's opinion (513-519), and as the facts set forth in the petition (pp. 2-5) do not fully or correctly disclose the circumstances as a result of which this case arose, we feel it necessary to make a statement of the case.

Spaulding, the seaman plaintiff, sued petitioner at law under the Jones Act (46 U. S. C., Section 688) claiming that his injuries had been caused by petitioner's negligence and also sued petitioner for maintenance and cure (6). Petitioner, electing to proceed at law for indemnity and contribution, filed a third party complaint against Todd Shipyards Corporation** under Rule 14 of the Federal Rules of Civil Procedure, on the grounds that Todd's neg-

*References are to pages of the record.

**Hereinafter Todd Shipyards Corporation will be referred to as Todd.

ligence "was the sole and proximate cause of the injury to plaintiff." It then demanded full indemnity (13). After judgment was entered against it, petitioner by motion for the first time, requested and obtained contribution (491-499).

The plaintiff did not make any claim against Todd, nor did he move to join Todd as a defendant or a party under Rule 14 of the Federal Rules of Civil Procedure.

Todd answered the third party complaint, but did not file any answer to plaintiff's complaint nor did it participate in the trial of the issues between the plaintiff and the petitioner (58-59, 90). Todd was not a joint defendant with petitioner.

The facts in the action at law of petitioner against Todd for indemnity or contribution are as follows:

(1) That Todd provided and paid for the berth at Pier 16 (471).

(2) That Todd placed the ladder against the ship (472).

(3) That the ladder was not defective in any way nor was there any foreign or greasy or oily substance on the ladder (472).

(4) That Todd controlled the ladder in question at the time when the ship was being berthed at Pier 16 (472).

In connection with the findings of fact listed as 2 and 4 above, there were issues between petitioner and Todd as to who controlled the ladder while it was lying on the dock; who controlled the ladder while it was being placed against the ship; and who placed the ladder against the ship. The jury decided against Todd on these two issues.

There was no issue on the trial between petitioner and Todd as to who controlled and had custody of the ladder after it was placed against the ship, nor was there any

issue as to who was responsible for lashing the ladder, after it had been placed against the ship, as the petitioner admitted, and the undisputed evidence shows that the petitioner took custody and control of the ladder and was under the obligation to lash the ladder and keep it lashed (516).

When the ladder was placed against the ship gangway guards, employed by the petitioner, immediately took custody and control of the ladder for the petitioner (165-166, 167, 171, 191-192, 516).

The master of the vessel testified that it was the ship's obligation and duty to lash the ladder and that it was specifically the duty of the chief mate to see that it was secured at all times (248). The chief night mate and security officer of the ship testified to the same fact and that it was also his duty to maintain the ladder in good and safe condition (216-217, 224, 516). The junior third mate also testified that it was the ship's obligation (296). The boatswain testified to this obligation of the ship and that it was his duty to lash the ladder when first put up and to see that it remained secured (327-329). All of these men were witnesses for petitioner.

Witnesses called by the plaintiff also testified to the same effect. These were the third mate (71-72, 95); the third assistant engineer (118); the chief electrician (128); and the plaintiff himself (516).

The Court of Appeals on these undisputed facts found that after the ladder was placed against the ship the petitioner had custody and control of the ladder, and still had custody and control of the ladder at the time of the accident (516, 517-518).

(5) That the ladder when first placed against the ship was properly lashed (516). There was no finding made as to the identity of the party or parties, who lashed the ladder.

This finding was in accordance with the undisputed testimony of the petitioner's witnesses and was not disputed by the witnesses for Spaulding, as these witnesses did not see the ladder until about an hour after it had been first placed against the ship (516). The ship arrived at the dock at 8:45 A. M. (344, 349). The plaintiff's witnesses observed the ladder when they were going ashore to have a seaman's usual morning coffee or second breakfast, at about 10:00 A. M. (67, 105, 120, 294). Not one of them could or did testify that the ladder was not lashed when first placed against the ship. None of the plaintiff's witnesses were in a position on the ship to see whether or not the ladder was lashed when it was first put up because they were engaged in other duties and in other parts of the vessel.

The alleged undertaking of Todd to provide berth, wharf, towage or other service and facilities (Defendant's Exh. B-266) did not impose or imply any obligation on the part of Todd to do any tying up or lashing. When the ship was placed in the berth, it was the crew of the ship who admittedly put out the mooring lines and properly made the ship fast. It also was admitted by the officers and the crew of the ship that it was the duty of the ship to lash the ladder (516).

(6) At the time of the accident, the petitioner had custody and control of the ladder.

There was no evidence presented on which a finding could be made other than at the time of the accident petitioner had control. The Court of Appeals found that gangway guards, who were members of the ship's crew, were stationed at the head of the ladder and took charge of the use of the ladder on behalf of the ship (516), that it was not Todd's duty to lash the ladder (515), that it was petitioner's duty to lash the ladder and to see that it was secure at all times (516, 517-518), and that the unlashed condition of the ladder was caused by the neglect of fellow

seamen whose duty it was to lash it to the ship's rail (517-518).

(7) At the time of the accident, the ladder was improperly secured to the ship, and the failure to secure the ladder caused or contributed to plaintiff's injury (472-473).

(8) Todd did not have any notice or knowledge that the ladder was subsequently unlashed (516).

(9) The officers of the ship knew that the ladder was unlashed and failed to correct the condition prior to the accident (473).

(10) An employee of petitioner descended the ladder while Spaulding was descending; that this employee was negligent; that this employee's negligence caused or contributed to Spaulding's injury (473).

(11) That Spaulding was not negligent in the manner in which he descended the ladder (474).

(12) That Spaulding had knowledge of the dangerous condition of the ladder (516).

The jury also found that Spaulding had notice of the danger and was negligent in using the ladder under the following finding:

> "(8) Was the ladder improperly secured to the ship—for example, by failing to lash the ladder to the ship's railing, so that a reasonably prudent person should have foreseen that someone using the ladder would be injured?
>
> Answer: Yes.
>
> (9) If the answer to (8) is 'yes', did the failure to secure the ladder properly cause or contribute to the injury to the plaintiff?
>
> Answer: Yes" (472-473).

Under the instructions of the Court, the plaintiff was naturally included in the category of a reasonably prudent person.

(13) That Spaulding's injuries were due solely to petitioners negligence upon the undisputed facts (515).

ARGUMENT.

Petitioner's questions as to uniformity of tort liability.

In the Court of Appeals, petitioner claimed indemnity from Todd on the theory that, although they were both liable to Spaulding as joint tort-feasors, Todd was guilty of "active negligence", while petitioner was only guilty of "passive negligence". In the alternative, petitioner claimed contribution from Todd on the theory that they were joint tort-feasors (515). Petitioner admitted its liability to Spaulding (514) and still admits this liability. Todd not only denied liability on its part to Spaulding but also denied any liability to petitioner.

The Court of Appeals held that petitioner's theories were not rationally possible if only one of the parties was negligent. In determining whether there was any liability of Todd to Spaulding, the Court of Appeals first assumed that the common law of New Jersey governed the legal relations between Todd and Spaulding (515) and then assumed that the maritime law governed the legal relations (517).

Upon the assumption that New Jersey law applied, the Court of Appeals considered the legal relations between Todd and Spaulding, first as being one in which Todd, as the possessor of the New Jersey dock and its appurtenances, which Spaulding was privileged to use as an invitee

(515-516); and second as being one in which Todd, in the State of New Jersey, supplied a dangerous chattel (the ladder) (515, 516-517), which chattel was not defective (472). On the facts it properly held that Todd was not negligent either as possessor of the dock or the supplier of a dangerous chattel. There is no doubt that this holding was in accordance with the common law.

The District Court, as is the petitioner, was mistaken in its view that there was no question that this action at law for indemnity or contribution solely "dealt with a maritime tort" (494). As the Court of Appeals said: "The Judge did not elaborate his statement that the suit dealt with a maritime tort" (517). Neither has the petitioner. The Court of Appeals considered the questions of liabilities on all possible grounds.

In *Just* v. *Chambers*, 312 U. S. 383 at 392, which was an action in admiralty, it was stated: "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." To the same effect, *Standard Dredging Corporation* v. *Murphy*, 319 U. S. 306.

The legal relations of the possessor of a New Jersey dock and an invitee and the supplier, in New Jersey, of an alleged dangerous chattel do not involve essential features of an exclusive federal or maritime jurisdiction and as such relations were possibly involved herein they were considered and determined.

When the Court of Appeals assumed that maritime law governed the legal relations between Todd and Spaulding it assumed that the ladder was a part of the vessel, as was the ship's gangplank in the *Admiral Peoples*, 295 U. S. 649 (Pet., p. 2) so that admiralty would have jurisdiction (517).

The Court of Appeals held that Spaulding had no claim under the Jones Act against Todd, as Todd was not subject to the Jones Act (517) and in so holding it correctly stated the maritime law on that point. *The Norland*, 9 Cir.,

101 Fed. 2d, 967; *Nolan* v. *General Seafood Corporation*, 1 Cir. 112 Fed. 2d, 515; *Baker* v. *Moore-McCormack Lines, Inc.* (D. C. Cal.) 57 Fed. Supp. 907; *Eggleston* v. *Republic Steel Corporation* (D. C. N. Y.) 47 Fed. Supp. 658; *Kwasizur, et al.* v. *Dawnic S/S Co., et al*, (D. C. Pa.) 25 Fed. Supp. 327.

When the Court of Appeals held that Spaulding, without the benefit of the Jones Act, could not recover against Todd because Todd had no notice of the conditions which caused the accident, that Spaulding had assumed the risk of using the ladder, the condition of which was known to him and which condition had been caused by the neglect of his fellow seaman whose duty it was to lash it to the ship's rail, it correctly stated and applied the maritime law, because Spaulding, without the benefit of the Jones Act, could not have recovered even from the shipowner under the facts of this case. *Robinson on Admiralty*, p. 309.

This holding was pursuant to the maritime law without any reference to the common law or the assumed law of New Jersey, (517-518). That this case was decided in accordance with maritime law is shown by the following cases.

In *Miller* v. *The Sultana*, 2 Cir. 176 F. (2d) 203, cert. den. 338 U. S. 907, an action was brought in admiralty by a prospective employee against the vessel on which he was seeking employment, as a member of the crew, for negligence based on the existence of an alleged obstruction in a passageway. The case was tried to a jury pursuant to the Great Lakes Act, 28 U. S. C. A. sec. 770 (1946) 28 U. S. C. A. 1873 (1948) and a decree entered on a special verdict of the jury in favor of the libellant. The special verdict in part found that the ship, its officers or crew failed to provide a passageway on the ship that was reasonably safe for the use under the circumstances. 176 F. (2d) at 205. The Court of Appeals in reversing judgment held at 207 of 176 F. (2d):

"His (plaintiff's) presence aboard, in such pursuit, was in the ship's interest as well as his own. Thus, he was a business 'guest' or 'invitee', . . ."

• • • • •

"The failure of the 'Sultana' to use reasonable care to provide a safe passageway for the visitor seeking employment would be a breach of its duty to such invitee."

• • • • •

". . . it was error to deny the motion to dismiss at the close of the evidence. There was no evidence of any breach of Sultana's duty or a failure to provide a safe passageway for the plaintiff. There was no evidence of notice, actual or constructive, to the ship that the passageway had become unsafe. This was necessary to go to the jury on any claim of negligence based on the existence of the alleged obstruction in the passageway."

To the same effect *Hendricksen* v. *Roberts* (D. C. N. Y.) 74 F. Supp. 72.

In *United States* v. *Rothschild International Stevedoring Co.*, 9 Cir. 183 F. (2d) 181, a stevedore sustained injuries while working on a vessel owned and operated by the United States. He was employed by Rothschild. The United States and Rothschild were both parties to the action and the United States claimed it should be granted full indemnity over or in the alternative judgment against Rothschild for contribution. The sole question involved was which party or parties were responsible for proximately causing the accident resulting in the injury, 183 F. (2d) 181 at 182. The United States, as owner, and supplier of the winch had notice that the winch, which caused the accident, was defective as did Rothschild, the employer. The Court, in reversing the judgment entered against the United States, holding it solely at fault, and in granting the United States full indemnity as against Rothschild, held at 183 F. (2d) 182 as follows:

> "It is clear that both the United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed."
>
> • • • • •
>
> "It is clear from the undisputed evidence that Rothschild used its discretion in permitting Dillon to work where it knew there was a defect which was dangerous, relying upon the chance that nothing would happen" (183 F. (2d) 183).

To the same effect *The Mars* (D. C. N. Y.) 1914, 9 F. (2d) 183, 184.

Under the decision of *United States* v. *Rothschild,* 183 F. 2d 181 even if it is assumed that Todd had a duty to lash the ladder when first put up, which is not admitted, and which duty could be comparable to the duty of the United States to furnish a proper winch, then there can not be any liability on the part of Todd to petitioner, because as found petitioner knew of the unlashed condition of the ladder, failed to perform its duty to lash it and permitted its employees to use it in its known dangerous condition. That there can be no liability on the part of Todd to petitioner is further shown by the findings of the Court of Appeals. Irrespective of who was to lash the ladder when first put up, the ladder when first put up was lashed; Todd did not have notice that it subsequently was unlashed; petitioner knew it was unlashed prior to the accident and at the time of the accident and permitted it to remain unlashed in violation of its admitted obligation to secure the ladder.

The foregoing shows that the case at bar was decided in accordance with the principles of the maritime law.

The petitioner contends there is a conflict between the decision in this case and the decision in the case of *Guerrini*

v. *U. S. A.*, 167 F. (2d) 352, cert. den. 335 U. S. 843. In the *Guerrini* case, which was in Admiralty, an action was brought against the shipowner by a longshoreman, who sustained injuries while working aboard a vessel. The Court of Appeals holdings as to Todd in no way conflicts with the *Guerrini* case, as in the *Guerrini* case it was held as follows (167 F. 2d 352 at 356):

> "In the case at bar the findings are not sufficient finally to dispose of the case; for, although the judge found the respondent negligent, that is not a finding of fact. True, he found that the libellant had slipped upon a patch of grease, but he did not find how long it had been on the deck; and the cause must go back for a specific finding on that issue, because the respondent's negligence depends upon how long the grease had been on the deck. Unless the libellant satisfies the judge that a patch of the size described had been left in the place described for a period long enough to be noticed by the officer on watch, the libel must be dismissed."

It was found by the court below that the ladder was lashed when put up. It was also found that Todd did not have notice that the ladder was subsequently unlashed prior to and at the time of the accident. There was no evidence that Todd had any notice of the condition (516).

The questions and contentions of petitioner (pp. 19-22, Petition) as to applying state law and the alleged conflict between the cases of *Puleo* v. *H. E. Moss & Co.*, 159 F. (2d) 842, *Guerrini* v. *U. S.*, 167 F. (2d) 352 on the one hand and *Robins Dry Dock & Repair Company* v. *Dahl*, 266 U. S. 449, *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85, *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 and *Cannella* v. *Lykes Bros.*, 174 F. (2d) 794 on the other was raised in the *Guerrini* case by means of a petition to this Court and this Court denied certiorari, 335 U. S. 843.

The cases of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 and *Cannella* v. *Lykes Bros.* 174 F. (2d) 794 which are relied

upon and discussed by the petitioner proceeded on and were decided on the duty or obligation of seaworthiness a shipowner owes to a longshoreman. In both cases the negligence count was dismissed. The question of seaworthiness is not involved and Todd was not under any such obligation or duty. There is no conflict between this case and *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402 or the other cases cited by petitioner because in this case the applicable maritime law was applied and it was decided in accordance with maritime principles (517-518).

With respect to petitioner's contention that the court below improperly followed the common law or the law of New Jersey, which is not admitted, rather than federal maritime law, it seems clear that, even if well-founded, petitioner has not been prejudiced thereby. As to the question on which it is claimed the court did refer to the common law and the law of the State of New Jersey—the negligence of Todd to either the petitioner or Spaulding—the federal maritime law, just as the common law, holds that upon the facts in this case there is no liability on the part of the Todd to either Spaulding or petitioner (Robinson on Admiralty, p. 309, *United States* v. *Rothschild International Stevedoring Co.*, 183 F. (2d) 181; *Miller* v. *Sultana*, 176 F. (2d) 203, cert. den. 338 U. S. 907; *Hendricksen* v. *Roberts*, D. C. N. Y. 74 F. Supp. 72). Since petitioner's rights as determined by the applicable federal maritime law would not have produced a result different than that arrived at by the court below, it is clear that the contended error, if it does exist, was harmless and hence does not warrant review. *West* v. *Camden*, 135 U. S. 507, 521; *McCandless* v. *United States*, 298 U. S. 342, 347-348.

It is quite clear that no error was made because when the court below considered the case as being within the maritime jurisdiction it applied federal maritime law and by so doing held Todd to a greater duty than it was obliged to bear. When the court, secondarily considered the lesser

duty of Todd it properly applied the rights of the maritime law as taken by analogy from the common law (517-518).

The court below did not commit any error in the proper application of the law as required when it first considered the matter as involving a terrene tort and then as one involving a maritime tort.

Petitioner's questions and reasons as to the rights of contribution.

The Court of Appeals did not, as contended by petitioner, hold that the existence of a right to contribution under the maritime law depends *exclusively* on the existence of a common or shared liability of the two wrongdoers to the injured party. There can be no doubt that the Court of Appeals for the Second Circuit knows that there is more than one basis for contribution.

The court below passed upon the questions raised by the theories of the petitioner as to indemnity and contribution (515). In view of petitioner's admitted negligence and liability to Spaulding, the petitioner was limited to the theories presented to the Court of Appeals and as again presented in this petition.

The Court of Appeals in deciding the questions raised by petitioner's theories below, disposed of the petitioner's theory, which was presented to the Court of Appeals, that it is entitled to contribution or indemnity because there was a breach of duty on the part of Todd to petitioner. As a basis for this argument petitioner again refuses to accept the facts as found below.

Assuming that there was an obligation on the part of Todd to lash the ladder when first put up, which is not admitted, the Court of Appeals found that the ladder was lashed when first put up. Petitioner, when presenting its case against Todd for indemnity and contribution produced

witnesses who testified that the ladder when first put up, was lashed. This testimony was not contradicted. The Court of Appeals further found that it was petitioner's duty, not Todd's, to see that the ladder was secure at all times (516, 517-518); and that Todd did not have notice that the ladder was not lashed (516). Neither petitioner nor Spaulding offered any evidence that Todd had notice that the ladder had become unlashed (516). It was also found that the ladder, which was supplied, was not defective in any manner (472). These facts eliminate any basis for this theory because they show that Todd did not breach any duty to petitioner.

The situation in the present case is not similar to the situations in the cases referred to by petitioner. Todd did not claim that any liability that it might have to the plaintiff was released or discharged by any Compensation Act or any maritime exemption from liability. There was not any mutual fault between the petitioner and Todd with respect to each other nor was there any joint fault or liability. No contract for indemnity or contribution was entered into by the parties as is admitted.

In referring to *The Chattahoochee,* 173 U. S. 540, the petition disregards the fact that in that case mutual faults as to each other existed between the contributing parties, which was he basis for awarding contribution, irrespective of the liabilities to an innocent party, and that the rule of mutual fault was applied by the court in granting contribution. The rule of joint liability was not available or involved. That case involved a collision between two vessels and both vessels were guilty of negligence as to each other in causing the collision. The carrying vessel was exempted from liability to the innocent party by reason of the provisions of the Harter Act, 46 U. S. C. A. 192.

The Chattahoochee is not applicable to the present case because it has been found that Todd did not breach any

duty or obligation which it owed the petitioner, nor is there any contention that the petitioner breached any duty it owed Todd. Not only do the findings of fact show that there was no mutual fault as between the petitioner and Todd with respect to each other as was the situation in *The Chattahoochee,* but, at no place in its petition does petitioner claim that Todd and the petitioner were mutually at fault with respect to each other.

In the case of *American Mutual Liability Insurance Co.* v. *Matthews,* 182 Fed. (2d) 322, the employer of the injured party claimed that it was released or discharged from all liability for injuries sustained by its employee by reason of a Compensation Act. Such is not the situation in the present case and the petitioner, in its action at law for indemnity and contribution had every opportunity, without a bar of any kind, to establish negligence on the part of Todd, either to the plaintiff or the petitioner, as a basis for contribution or indemnity. The petitioner failed in its proofs on the undisputed facts (515). The Court of Appeals decided on the facts that there was no liability on the part of Todd either to the petitioner or the plaintiff.

In *Porello* v. *U. S.,* 153 Fed. (2d) 605,* both parties were held at fault. The question of indemnity was based on a written contract of indemnity, which this Court eventually held to be ambiguous, 330 U. S. 446 (1947). As full contract indemnity was awarded by the Court of Appeals the question of contribution was not involved or passed upon. There is not any contract for indemnity or contribution involved in the present case.

Under the maritime law the petitioner is not entitled to contribution from Todd in the present case because: (1) The parties were not joint tortfeasors or jointly liable to Spaulding; (2) They were not guilty of mutual fault with respect to each other; (3) Todd did not breach any

*The Porello case, which has been retried in the District Court, we are informed has been appealed.

duty which it owed petitioner; (4) Todd is not liable to petitioner or Spaulding; (5) Petitioner is soley liable and was guilty of active negligence.

With respect to petitioner's contentions and discussion as to contribution (Petition, pp. 22-26; par. 4-7) they do not show that the decision of the Court of Appeals for the Second Circuit is in any way in conflict with the maritime law of contribution.

The petitioner does not cite one case that is in conflict with the present case. All of the cases deal with liability situations none of which is involved in the present case.

The cases cited granted contribution between parties on the following grounds: Mutual fault between the parties with respect to each other, in cases involving collisions between vessels;[1] contribution between joint tortfeasors.[2]

The disagreement of the Court of Appeals for the Third Circuit in the decision in the case of *Baccile* v. *Halycon Lines & Haenn Ship Ceiling and Refitting Corporation,* 187 F. (2d) 403 with the decision of The Court of Appeals for the Second Circuit in the case of *American Mutual Liability Co.* v. *Matthews,* 182 F. (2d) 322 referred to by petitioner (Pet. p. 23, Sec. 5) is not involved in the present case. The Third Circuit granted contribution between joint tortfeasors but limited the employer's amount of contribution to the extent of its liability to its employee under the Compensation Act. The Second Circuit held that the Compensation Act barred the establishing of negligence, as to its employee, on the part of the employer of the in-

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[1] *The Chattahoochee,* 173 U. S. 540 (Pet., pp. 10, 22, 24, 25, 26); *Erie Railroad Co.* v. *Erie & Western Transportation,* 204 U. S. 220 (Pet., pp. 22, 24); *Aktieselshabet Cuzco* v. *The Sucassecceo,* 294 U. S. 394, (Pet., pp. 23, 24, 25); *The Ira M. Hedges,* 218 U. S. 264 (Pet., pp. 23, 24); *The North Star,* 106 U. S. 17 (Pet., pp. 23, 25).

[2] *The Alabama* v. *Gewnecock,* 92 U. S. 695 (Pet., pp. 23, 25); *Barbarino* v. *Stanhope S. S. Co.,* 151 F. (2d) 553 (Pet., p. 23); *Baccile* v. *Halycon Lines & Haenn Ceiling and Refitting Corporation,* 187 F. (2d) 403 (Pet., p. 23); *Rederic* v. *Jarka Corp.,* 26 F. Supp. 304 (Pet., p. 23); *The Tampico,* 45 F. Supp. 174 (Pet., p. 23); *The S. S. Samovar,* 72 F. Supp. 574 (Pet., p. 23); *Portel* v. *United States,* 85 F. Supp. 458 (Pet., p. 23).

jured party in so far as injuries to its employees is concerned. It did not bar indemnity. The case of *American Mutual Liability Co.* v. *Matthews,* 182 F. (2d) 322 was not applied in this case. In both cases claims for contribution were based on the liability of joint tortfeasors which involved the effect of the Compensation Act on the claim for contribution between joint tortfeasors. Neither question is involved in the case at bar as the Court of Appeals held that under the maritime law there was no liability of any kind on the part of Todd to either plaintiff or petitioner and that petitioner was solely liable. The Court of Appeals did not hold that either Spaulding or petitioner were barred from establishing the negligence of Todd, but did hold on the facts that the petitioner had failed in its proofs.

The contentions of the petitioner as to the position of the Court of Appeals for the Second Circuit (Pet. pp. 24-26, Sec. 7) as to contribution is without foundation in law or in fact. We have heretofore shown that every case involving contribution cited by petitioner under this point, has no bearing or application to the facts in the case at bar (See p. 16 this Brief). The petitioner still disregards the facts as found by basing its arguments on the negligence of Todd, which the Court of Appeals on the undisputed facts (515) and under the maritime law, (517-518) found did not exist. As only the petitioner was held to be guilty of negligence the court properly denied the granting of admiralty contribution. It did not hold that the only basis for admiralty contribution was where the wrongdoers share common liabilities to the injured parties and it did not discard the theory of admiralty contribution. Under the admiralty theory of contribution there cannot be an award of contribution when one party alone is guilty of negligence and the other party is entirely free of fault or liability of any kind.

The contentions made as to the *Matthews* case, 182 F. (2d) 322 and *The Chattahoochee,* 173 U. S. 540 have no

bearing on this case as the questions involved therein were entirely different from the one in this case as previously shown and are not reasons for granting the writ prayed for herein.

The question of contribution was correctly decided by the Court of Appeals according to the maritime law and in accordance with the principles of contribution under the maritime law.

Petitioner's questions and reasons as to the rights of indemnity.

The petitioner's contentions and reasons as to indemnity (Pet., pp. 26-27, par. 8, Sec. 8-11) are also without foundation in law or in fact.

The Court of Appeals did not, as contended by petitioner, hold that the right of indemnity depended solely upon both wrongdoers being liable to the injured party. The court held that there was only one wrongdoer in the case at bar and naturally there could be no right of indemnity.

The petitioner not only has been held to be the sole partly guilty of negligence, but has been held to be guilty of active negligence, on the undisputed facts. There is no finding that Todd breached a contractual duty to petitioner nor is there any evidence upon which such a finding could be based, as shown by the findings of fact and our previous discussion of the facts.

It was found as a fact that when the ladder was first put up it was lashed (516), that it was petitioner's duty to lash the ladder to the ship's rail (517-518) and that it was petitioner's admitted duty to keep it secured (516). In addition to the foregoing it was found as a fact, which is undisputed, that petitioner's employee, Moyer, was negligent and caused or contributed to the accident (473, Findings 12, 13, 14). In view of this admitted active and proximate negligence on the part of the petitioner, there is no

doubt that the Court of Appeals for the Second Circuit disposed of the claim for indemnity correctly under and pursuant to the maritime law as well as the common law. None of the cases cited by petitioner show any conflict between this decision on indemnity upon the facts and any other decision involving indemnity under the maritime law.

In *Bethlehem Shipbuilding Corporation, Limited* v. *Joseph Gutradt Co., et al.*, 10 F. (2d) 769 (Pet., p. 26) the shipyard was held to be the one solely negligent in performing repairs and that the ship did not have notice of the improper condition, nor was it obligated to look for the improper condition. In the present case, the ship caused and permitted the improper condition to arise and permitted it to continue both in violation of its obligations. Todd did not have notice of the condition nor did it cause or permit it to come about or continue.

We have heretofore discussed the case of *United States* v. *Rothschild International Stevedoring Co.*, 183 F. (2d) 181, cited by petitioner (Pet. p. 26) and have shown that it is not in conflict with the case at bar. Rothschild, the employer, had notice of the dangerous condition which caused the accident, the same as the petitioner-employer herein. Rothschild was held liable for full indemnity, notwithstanding that the United States also had notice of the defect in the winch which it supplied. In the case at bar the ladder was not defective and Todd was without notice of the unlashed condition of the ladder.

In the *No. 34*, 25 F. (2d) 602, (Pet. p. 26) the owner of the vessel was held to be actively and proximately negligent because it failed to perform its duty to lash the ladder which was used to board and leave the vessel, and, therefore, had to indemnify the employer of the longshoreman because the employer had no notice or knowledge of the condition which caused the injury.

In *Standard Oil Company* v. *Robins Dry Dock and Repair Co.*, 32 F. (2d) 182 (Pet. p. 26), the dry dock furnished a defective gangway and the shipowner had no

notice or knowledge of the condition. In the present case, the ladder was not defective and Todd was held to be free from all fault with respect to the ladder. In addition, Todd did not have notice of the condition which caused the accident which condition was fully known to petitioner for some time prior to the accident.

It is admitted by petitioner that the latter two cases treated the right of indemnity with respect to a maritime tort as a maritime right borrowed from the common law by analogy. Even under the common law the petitioner would not be entitled to indemnity upon the findings of this case. *Union Stockyards Company of Omaha* v. *Chicago, Burlington & Quincy Railroad Company,* 196 U. S. 217.

The finding that Todd on the undisputed facts was without fault either as to petitioner or Spaulding and that the petitioner was solely and actively negligent disposed of the petitioner's claim for indemnity.

Conclusion.

The petition does not present any questions of law, which were not presented to and considered by the Court of Appeals for the Second Circuit. The decision of the court below is correct and in accordance with maritime law. The alleged conflict as to choice of law, which does not exist in this case, could not here produce a different result and it is clear that the error, assuming that error exists for the sake of argument, was harmless, as the petitioner could not recover in any event, either under the maritime law or the common law, and hence does not warrant review.

Respectfully submitted,

JAMES I. CUFF,
Counsel for Respondent.

June, 1951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 728.

PARRY NAVIGATION COMPANY, INC.,
Petitioner,

against

TODD SHIPYARDS CORPORATION,
Respondent.

REPLY BRIEF OF PARRY NAVIGATION COMPANY, INC., PETITIONER.

Todd's brief, by mis-stating the facts, seeks to defeat the granting of *certiorari* by making it seem that the questions sought to be reviewed herein are not actually involved. The purpose of this reply brief, therefore, is solely to show wherein the facts are so mis-stated. The court will then be in a proper position to judge whether the questions involved herein should be reviewed.

Todd's brief is particularly misleading in its representations as to who controlled the offending ladder after it had been placed by Todd against the vessel. Todd admits, at page 2 of its brief, that Todd controlled the ladder in the morning, when the ship was coming alongside the dock, and later when Todd placed the ladder against the ship. (64, 67). However, Todd goes on to say (Todd's brief, pp. 2 and 3), that, after Todd had so placed the ladder against the ship, petitioner, Parry, took control of the ladder and

kept control of it up until the time of the accident in the evening. (140). Todd goes so far as to say that Parry admitted this.

In the light of what the jury actually found, this is untrue. Actually, the jury found as follows: (472).

> "3. Did Todd or Parry control the ladder in question when the ship was berthed at Pier 16 *at the time of the accident?*"
>
> Answer: Todd (Emphasis ours.)

In view of the foregoing, *i. e.* that Todd controlled the ladder, not only when Todd placed it against the ship in the morning (472, 64, 67), but, also, when the accident happened in the evening (472, 140), and, in view of the absence of any finding or evidence that, between the two events, Todd was divested of its control, one may well be astonished at Todd's unsupported statements as to petitioner's custody and control of the ladder. The fact is that petitioner never had control of the ladder at any time. Neither the jury nor the Court of Appeals found that it had.

When respondent says, at page 3 of its brief, that the Court of Appeals found that petitioner had custody and control of the ladder at the time of the accident, the respondent mis-states the holding of the Court of Appeals. The Court of Appeals noted that the jury found that "• • • Todd was in control of the ladder at the time of the accident." (514) But, the Court of Appeals noted, also, that "Gangway Guards, who were members of the ship's crew, were stationed at the head of the ladder and took charge *of the use* of the ladder on behalf of the ship." (516) (Emphasis ours) In so saying, the Court of Appeals merely referred to the fact that, whereas the ladder, as the jury found, was in Todd's control, anyone leaving the vessel or coming aboard had to use certain adjacent parts of the vessel which

were in the control of petitioner. It followed therefore, that the ladder was offered as an adopted ship's appliance for the use of petitioner's seamen-employees.

In the same vein, Todd's brief misrepresents the facts as to what was found below in respect of the duties of Todd and the petitioner. Quite properly, Todd notes, on page 3, that the petitioner, being a shipowner, had an obligation to its injured employee to lash the ladder. However, on page 4, Todd's brief makes the bold statement that Todd did not have a duty to lash the ladder, i.e. a duty to anyone.

But, the jury found, not only that Todd placed the ladder and controlled the ladder, but failed in a duty to lash the ladder. Specifically, the jury found as follows: (472, 473)

> "8. Was the ladder improperly secured to the ship—for example, by failing to lash the ladder to the ship's railing, so that a reasonably prudent person should have foreseen that someone using the ladder would be injured?
>
> Answer: Yes."
>
> "9. If the answer to (8) is "yes", did the failure to secure the ladder properly cause or contribute to the injury to the plaintiff?
>
> Answer: Yes."
>
> "11. If the answer to (9) is "yes", was it the duty of the seamen in the deck department of the ship or the duty of Todd, or of both, to see to it that the ladder was properly secured or lashed?
>
> (Answer: "Deck Department" or "Todd" or Both".)
>
> Answer: Both.

In finding that Todd had this duty, the jury referred to a duty arising by way of the contract which was recognized

by the jury as existing between Todd and petitioner when it answered questions 1 and 2 as follows: (471, 465, 466 Defendant's Exhibit B, 266)

> (1) Did Todd Shipyards provide and pay for the berth at Pier 16 where the S/S *Lindenwood Victory* was moored on August 14, 1947?
> Answer: Yes.
>
> (2) If the answer to (1) is "yes", was it the general practice at the Port of New York in August 1947 for ship repair companies to provide a ladder or gangway for the ship's crew to board and leave their vessel at a berth provided by the ship repair company?
> Answer: Yes.

Undoubtedly, petitioner, as a shipowner, had a duty to its seaman employee to lash the ladder. Such a duty would be embraced in the general duty to give an employee a safe place in which to work. Petitioner has never denied that it had such a duty. On the other hand, it is strange that Todd should say that petitioner was the only one who had a duty to lash the ladder, notwithstanding that the jury found that Todd controlled the ladder and that Todd had a contractual duty to lash it. Even assuming that Todd did not have a duty to the injured seaman to lash the ladder, but, that is not to say that Todd did not owe petitioner such a duty by reason of its contract with petitioner.

Moreover, the Court of Appeals did not find, as stated by Todd, at page 4, that Todd did not have a duty to anyone to lash the ladder. The Court of Appeals held, merely, that Todd did not have such a duty to the injured seaman. (516).

It is precisely because Todd failed in its contractual duty to petitioner that Todd is liable to petitioner. It is because of the Court of Appeal's denial of that liability, after it had

been found in part, by the District Court, that the legal questions involved herein arise.

On page 3 of Todd's brief, it is said that among the facts was the following:

> "(5) That the ladder when first placed against the ship was properly lashed. (516)."

There is no justification for such a statement.

The jury's findings, 3, 4 and 8, when taken together, make it plain that the jury found that the ladder, when first placed against the ship by Todd, was not lashed. Thus, the jury found as follows (472-473):

> "3. Did Todd or Parry control the ladder in question when the ship was berthed at Pier 16 at the time of the accident?
>
> Answer: Todd.
>
> 4. Did Todd place the ladder in question against the ship?
>
> Answer: Yes.
>
> 8. Was the ladder improperly secured to the ship —for example, by failing to lash the ladder to the ship's railing, so that a reasonably prudent person should have foreseen that someone using the ladder would be injured?
>
> Answer: Yes."

The composite meaning of these findings is that the ladder which was placed against the ship by Todd, and which was, thereafter, in Todd's control up until and at the time of the accident, was improperly secured to the ship by Todd's "failing to lash the ladder to the ship's railing" when Todd placed it against the ship. There was ample evidence, produced by the injured seaman's witnesses, to support such a finding. (67, 68, 70, 84, 95, 105, 111, 117, 120, 131, 138, 157).

The Court of Appeals did not, in contradiction to the jury's finding, find that, when the ladder was first placed against the ship by Todd, it was properly lashed. See Todd's brief, pp. 13, 3. The Court of Appeals said, merely, that "Parry's witnesses testified that when the ladder was first put up it was properly secured." (516) The Court of Appeals, on the erroneous assumption that petitioner was bound by its contentions, rather than by the facts as found by the jury, went on to say that it did not appear how the lashing was thereafter removed. (516). However, in view of the fact that the jury did not believe petitioner's witnesses, but rather, the witnesses for the injured seaman, who testified that the ladder was not lashed when they saw it in the morning shortly after it had been placed against the ship, the observation of the Court of Appeals was irrelevant.

Todd's brief, at page 5, says that "Todd did not have any notice or knowledge that the ladder was subsequently unlashed (516)." In view of the jury's finding as to Todd's physical control of the ladder, this is a surprising statement. Such physical control implies a knowledge of its condition at all times.

It is in the light of the foregoing that one should view the repeated misrepresentations occurring elsewhere in Todd's brief. The following are fair examples:

1. (Todd's brief, bottom of page 13).

> "* * *, the Court of Appeals found that the ladder was lashed when first put up. Petitioner when presenting its case against Todd for indemnity and contribution produced witnesses who testified that the ladder when first put up was lashed. This testimony was not contradicted. The Court of Appeals further found that it was petitioner's duty, not Todd's, to see that the ladder was secured at all

times (516, 517-518); and that Todd did not have notice that the ladder was not lashed 516."

2. (Todd's brief, bottom of page 14).

"*The Chattahoochee* is not applicable to the present case because it has been found that Todd did not breach any duty or obligation which it owed the petitioner, nor is there any contention that the petitioner breached any duty it owed Todd."

3. (Todd's brief, bottom of page 15).

"* * * Todd did not breach any duty which it owed petitioner;"

4. (Todd's brief, middle of page 18).

"There is no finding that Todd breached a contractual duty to petitioner nor is there any evidence upon which such a finding could be based, as shown by the findings of fact and our previous discussion of the facts."

This sort of thing, when exposed, does not serve to accomplish a desired obfuscation. It serves only to emphasize how fantastic were the legal principles which were applied below, when the petitioner, on being found liable to its servant, could then be denied the usual recourse against the one who owned the ladder, who, pursuant to contract with petitioner, placed it against petitioner's vessel, who controlled it at all times, and who failed in a contractual duty owed to the petitioner to make it safe for the purpose intended.

Respectfully submitted,

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